
Appendix C: Treaty Indian Fishing Rights**Legal Background**

Treaties between the United States and numerous Pacific Northwest Indian tribes reserve to these tribes the right of taking fish at usual and accustomed grounds and stations (“u & a grounds”) in common with all citizens of the United States. See U.S. v. Washington, 384 F. Supp. 312, 349-350 (W.D. Wash. 1974).

The National Marine Fisheries Service (NMFS) recognizes four tribes as having u & a grounds in the marine areas managed by the Groundfish FMP: the Makah, Hoh, and Quileute tribes, and the Quinault Indian Nation. The Makah Tribe is a party to the Treaty of Neah Bay, Jan. 31, 1855, 12 Stat. 939. See 384 F. Supp. at 349, 363. The Hoh and Quileute tribes and the Quinault Indian Nation are successors in interest to tribes that signed the Treaty with the Quinault, et al. (Treaty of Olympia), July 1, 1855, 12 Stat. 971. See 384 F. Supp. at 349, 359 (Hoh), 371 (Quileute), 374 (Quinault). The tribes’ u & a grounds do not vary by species of fish. U.S. v. Washington, 157 F.3d 630, 645 (9th Cir. 1998).

The treaty fishing right is generally described as the opportunity to take a fair share of the fish, which is interpreted as up to 50 percent of the harvestable surplus of fish that pass through the tribes’ u & a grounds. Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 685-687 (1979) (salmon); U.S. v. Washington, 459 F. Supp. 1020, 1065 (1978) (herring); Makah v. Brown, No. C85-160R, and U.S. v. Washington, Civil No. 9213 - Phase I, Subproceeding No. 92-1 (W.D. Wash., Order on Five Motions Relating to Treaty Halibut Fishing, at 6, Dec. 29, 1993) (halibut); U.S. v. Washington, 873 F. Supp. 1422, 1445 and n. 30 (W.D. Wash. 1994), aff’d in part and rev’d in part, 157 F.3d 630, 651-652 (9th Cir. 1998), cert. denied, 119 S.Ct. 1376 (1999) (shellfish); U.S. v. Washington, Subproceeding 96-2 (Order Granting Makah’s Motion for Summary Judgment, etc. at 4, November 5, 1996) (Pacific whiting). The court applied the conservation necessity principle to federal determinations of harvestable surplus in Makah v. Brown, No. C85-160R/ United States v. Washington, Civil No. 9213 - Phase I, Subproceeding No. 92-1, Order on Five Motions Relating to Treaty Halibut Fishing, at 6-7, (W.D. Wash. Dec. 29, 1993); Midwater Trawlers Co-op. v. Department of Commerce, 282 F.3d 710, 718-719 (9th Cir. 2002).

The treaty right was originally adjudicated with respect to salmon and steelhead. However, it is now recognized as applying to all species of fish and shellfish within the tribes’ u & a grounds. U.S. v. Washington, 873 F.Supp. 1422, 1430, aff’d 157 F.3d 630, 644-645 (9th Cir. 1998), cert. denied, 119 S.Ct. 1376; Midwater Trawlers Co-op. v. Department of Commerce, 282 F.3d 710, 717 (9th Cir. 2002) [“The term ‘fish’ as used in the Stevens Treaties encompassed all species of fish, without exclusion and without requiring specific proof. (citations omitted)”]

NMFS recognizes the areas set forth in the regulations cited below as marine u & a grounds of the four Washington coastal tribes. The Makah u & a grounds were adjudicated in U.S. v. Washington, 626 F.Supp. 1405, 1466 (W.D. Wash. 1985), aff’d 730 F.2d 1314 (9th Cir. 1984); see also Makah Indian Tribe v. Verity, 910 F.2d 555, 556 (9th Cir. 1990); Midwater Trawlers Co-op. v. Department of Commerce, 282 F.3d 710, 718 (9th Cir. 2002). The u & a grounds of the Quileute, Hoh, and Quinault tribes have been recognized administratively by NMFS. See,

e.g., 67 Fed. Reg. 30616, 30624 (May 7, 2002) (u & a grounds for salmon); 50 C.F.R. 660.324(c) (u & a grounds for groundfish); 50 C.F.R. 300.64(i) (u & a grounds for halibut). The u & a grounds recognized by NMFS may be revised as ordered by a federal court.

Current Regulations

In 1994, the United States formally recognized that the four Washington coastal treaty Indian tribes (Makah, Quileute, Hoh, and Quinault) have treaty rights to fish for groundfish in the Pacific Ocean, and concluded that, in general terms, the quantification of those rights is 50 percent of the harvestable surplus of groundfish that pass through the tribes' usual and accustomed ocean fishing areas (described at 60 CFR 660.324). A federal regulation that specifically pertains to treaty Indian fisheries for groundfish was promulgated at 50 C.F.R. 660.324. This regulation acknowledges treaty Indian fishing rights, lists the tribes with fishing rights in the EEZ, describes the boundaries of the relevant tribes' u & a grounds in the Pacific Ocean, and establishes procedures for implementation of tribal rights.

Under the current groundfish regulations, a tribal allocation is subtracted from the species' OY before limited entry and open access allocations are derived. The tribal fisheries for sablefish, black rockfish, and whiting are separate fisheries, and are not governed by the limited entry or open access regulations or allocations. The tribes regulate these fisheries so as not to exceed their allocations.

In 2004, the tribal allocation for black rockfish taken for commercial purposes is 20,000 lb (9,072 kg) north of Cape Alava, WA (48 degrees 09'30" N. lat.) and 10,000 lb (4,536 kg) between Destruction Island, WA (47 degrees 40'00" N. lat.) and Leadbetter Point, WA (46degrees 38'10" N. lat.). The tribal sablefish allocation is 10 percent of the total catch OY north of Point Conception, CA (751 mt), less 3 percent for estimated discard mortality, or 728.5 mt.

In 1999 through 2004, the tribal whiting allocation has been based on a methodology originally proposed by the Makah Tribe in 1998. The methodology is an abundance-based sliding scale that determines the tribal allocation based on the level of the overall U.S. OY, up to a maximum 17.5 percent tribal harvest ceiling at OY levels below 145,000 mt. To date, only the Makah Tribe has conducted a whiting fishery.

The sliding scale methodology used to determine the treaty Indian share of Pacific whiting is the subject of ongoing litigation. In United States v. Washington, Subproceeding 96-2, the Court held that the sliding scale allocation methodology is consistent with the Magnuson-Stevens Act, and is the best available scientific method to determine the appropriate allocation of whiting to the tribes. United States v. Washington, 143 F.Supp.2d 1218 (W.D. Wash. 2001). This ruling was reaffirmed in July 2002, Midwater Trawlers Cooperative v. Daley, C96-1808R (W.D. Wash.) (Order Granting Defendants' Motion to Supplement Record, July 17, 2002), and again in April 2003, id., Order Granting Federal Defendants' and Makah's Motions for Summary Judgment and Denying Plaintiffs' Motions for Summary Judgment, April 15, 2003. The latter ruling has been appealed to the Ninth Circuit, but no decision has been rendered as yet. As of 2004, NMFS remains under a court order in Subproceeding 96-2 to continue use of the sliding scale methodology unless the Secretary of Commerce finds just cause for its alteration or

abandonment, the parties agree to a permissible alternative, or further order issues from the Court. Therefore, NMFS is obliged to continue to use the methodology unless one of the events identified by the Court occurs.

For some species on which the tribes have a modest harvest, no specific allocation has been determined. Rather than try to reserve specific allocations for the tribes, NMFS has established trip limits recommended by the tribes and the Council to accommodate modest tribal fisheries. In 2004, tribal harvest limits are as follows. For lingcod, all tribal fisheries are restricted to 450 lb (204 kg) per day and 1,350 lb (612 kg) per week cumulative limits. Tribal fisheries will be managed with a 25-mt lingcod harvest guideline. For rockfish species, the 2004 tribal longline and trawl fisheries will operate under trip and cumulative limits. Tribal fisheries will operate under a 300-lb (136-kg) per trip limit each for canary rockfish, thornyheads, and the minor rockfish species groups (nearshore, shelf, and slope), and under a 100-lb (45-kg) trip limit for yelloweye rockfish. A 300-lb (136 kg) canary rockfish trip limit is expected to result in landings of 3.6 mt in 2004. A 300-lb (136-kg) thornyheads trip limit is expected to result in landings of 4.8 mt in 2004. Other rockfish limits are expected to result in the following landings levels: widow rockfish, 40 mt; yelloweye rockfish, 3.1 mt; yellowtail rockfish, 400 mt; minor nearshore rockfish, 2 mt; minor shelf rockfish excluding yelloweye, 4.5 mt; minor slope rockfish, 4 mt. Trace amounts (<1 mt) of POP and darkblotched rockfish may also be landed in tribal commercial fisheries.